SUPREME COURT, U. S.

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MICHAEL RODAK, J

No. 73-5641

In the Supreme Court of the United States

OCTOBER TERM, 1973

TERRY EUGENE SAVAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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Petitioner contends that his written consent to a search of his residence was not voluntary.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of two counts of bank robbery, in violation of 18 U.S.C. 2113 (a) and (d) and 18 U.S.C. 2. Two co-defendants were found not guilty.

Petitioner was sentenced to a ten-year prison term on count one and a fifteen-year prison term on count two. The trial court thereafter vacated the judgment as to count one. The court of appeals affirmed (Pet. App. A).

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Petitioner then filed a motion to vacate the judgment under 28 U.S.C. 2255, which was denied by the trial court. The court of appeals found no error in the district court's denial; however, the original judgment was vacated and a new judgment entered reaffirming the judgment of conviction in the criminal case. This was done to enable petitioner to petition for a writ of certiorari, which his court-appointed counsel had promised but failed to do (Pet. App. B).

Immediately after the Peoples National Bank of Miami, Florida, had been robbed of some $74,000 by armed men who had struck and injured a guard, Federal Bureau of Investigation agents obtained information linking petitioner to a car used in the robbery. Agents Lawson, Spero and Rivera were taken to petitioner's house by Eddie Smart, the owner of the car, who said he had loaned it to petitioner. When petitioner answered the door the agents identified themselves and told him that they were investigating a bank robbery and wanted to ask him questions regarding the location of Smart's car (M.S. I 14; Tr. 284).[1] Petitioner agreed and stepped back, allowing the agents and Smart to enter (Tr. 285).

Within twenty seconds a disturbance occurred outside, and Agents Lawson and Rivera ran out (M.S. I 17; Tr. 206, 286). Agent Spero testified that he was left alone inside the house with petitioner, co-defendant Montue Oliver, and Eddie Smart. A knife was open

[1] "M.S. I" refers to the transcript of the suppression hearing on August 6, 1971, and "M.S. II" refers to the transcript of the August 9, 1971 suppression hearing, both of which are bound as one volume. "Tr." refers to the transcript of the trial.

at Oliver's side (M.S. II 18–19). Spero, who said that he felt in danger because he knew that a bank guard had been pistol-whipped and that a gun was fired in the bank, drew his revolver and held it at his side (Tr. 287–288).

Within minutes, Agent Bell arrived. Agent Bell advised both Oliver and petitioner fully of their *Miranda* rights. Both men were given "advice of rights" forms, which they signed (Tr. 308; M.S. I 44–45; Pet. App. C). After petitioner said he rented the house, Agent Bell told him that they would like permission to search the house, but that petitioner did not have to agree (M.S. I 57–58). Petitioner asked the agent if he could get a search warrant. Bell told him that he could, but that he would have to see the United States Attorney (Tr. 314; M.S. I 58). Petitioner then signed a "Consent to Search" form (Gov. Ex. 19; Tr. 309; Pet. App. D). There were a number of law enforcement personnel in and about the house when the consent form was signed. Thereafter, the agents searched the house and found a driver's license, key, rental agreement, and sketch of the bank (M.S. I 65, 69).

Petitioner's contention that his consent to search the house was not voluntary is without merit. The search was made only after petitioner had signed a consent form which stated specifically that he had the right to refuse to consent to the search. The form also stated that permission to search was being given voluntarily and without threats or promises of any kind (Pet. App. D). Prior to this, petitioner had been advised of

his *Miranda* rights and had signed a form to that effect. He had also been told that he did not have to consent to the search. As the court below held, no misrepresentations were made by Agent Bell to induce petitioner to consent to the search,[2] in contrast to *Bumper* v. *North Carolina,* 391 U.S. 543, on which petitioner relies. As the court of appeals properly noted, "[t]he officer's statement was in response to defendant's inquiry, and it was not a misrepresentation of the facts" (Pet. App. A 1).

Nor is there any evidence that the number of law enforcement agents in the house coerced petitioner to sign the consent form. The finding of the district court that in the setting of this case there was voluntary consent was properly upheld by the court below, and there is no occasion for further review by this Court.

It is therefore respectfully submitted that petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2] As Bell testified (M.S. I. 58):

"* * * I told him that we would like permission to search the residence. And he was the owner and he could give us the permission; that he did not have to give us the permission to search.

"He then asked me if we could get a search warrant and I told him we could, that we would have to see the U.S. Attorney. And he said, 'Well if you can get one, then why shouldn't I sign the form?' And he signed the form and we conducted the search."

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